

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KALIA v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 2196

Catchwords:

MIGRATION – Visa – partner visa – whether spousal relationship existed – procedural fairness – whether actions of Department rendered Tribunal proceedings unfair – whether Tribunal erred in failing to locate and call witness – no error demonstrated – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 65 & 361,
Migration Regulations 1994 (Cth), reg.1.15A, cls.801.221, 820.211 & 820.221

Applicant:	DHIRAJ KALIA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	ADG 73 of 2016
Judgment of:	Judge Heffernan
Hearing date:	28 July 2016
Date of Last Submission:	28 July 2016
Delivered at:	Adelaide
Delivered on:	7 September 2016

REPRESENTATION

The Applicant:	In person
Solicitors for the Respondents:	Mr A Cunynghame for Sparke Helmore Lawyers

ORDERS

- (1) The application dated 9 March 2016 is dismissed.
- (2) The applicant do pay the first respondent's costs to be agreed or taxed.
- (3)
- (4)
- (5)
- (6)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 73 of 2016

DHIRAJ KALIA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal ('the Tribunal') dated 4 February 2016. That decision affirmed an earlier decision made by a delegate of the Minister for Immigration on 29 July 2015 refusing to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (Cth) ('the Act').
2. The applicant was self-represented in the hearing before me. His application raises two grounds. They are as follows:

*"1. The decision of the Administrative Appeals Tribunal, Migration & Refugee Division (**the Tribunal**) made on 4 February 2016 was affected by a jurisdictional error in that the Tribunal denied the Applicant procedural fairness by*

accepting the evidence of the Applicant's brother and failing to take into account the Departmental officers' failure to speak to the Applicant's other family members on their site visit to the Applicant's family home in India.

2. *The decision of the Administrative Appeals Tribunal, Migration & Refugee Division (**the Tribunal**) made on 4 February 2016 was affected by a jurisdictional error in that the Tribunal denied the Applicant procedural fairness by failing to make further attempts to contact the sponsor during the hearing."*
3. The applicant relied on an affidavit which simply annexed a copy of the Decision Record of the Tribunal and did not add any further details. The applicant also indicated that he relied on the materials contained in the Court Book which had been prepared by the first respondent.
4. On 8 April 2016, the Registrar made orders giving the applicant leave to file any amended application by 27 May 2016. He was also given leave to file and serve such further material, including transcript of the proceedings before the Tribunal, if he wished to rely on it at the hearing. He was ordered to file and serve any outline of submissions 14 days prior to the hearing. The applicant has not filed any further affidavit material, has not filed an amended application, and did not file a written outline of submissions.
5. In its Outline of Submissions, the first respondent has helpfully summarised the factual and procedural background to this application. I do not understand those matters to be the subject of any dispute on the part of the applicant. Accordingly, I have para-phrased them below.
6. The applicant was born in India on 29 June 1998 and is an Indian citizen. His sponsor is Ms Jacinta Louise Kalia, an Australian citizen. The applicant married the sponsor on 15 December 2012. This occurred in the presence of two witnesses, Kanwar Navdeep Bhullar and Jacqueline Evans.
7. The application for the combined Partner (Temporary) (Class UK) Subclass 820 visa and Partner (Residence) (Class BS) Subclass 801 visa was lodged on 8 February 2013. The basis for applying for this visa was the relationship with the sponsor. In support of this application, the applicant submitted documents including: a copy of his

passport; a copy of his birth certificate; a copy of some pay slips from the sponsor; a statutory declaration from both himself and his wife, and supporting witnesses.¹

8. The applicant was invited by the Department of Immigration and Border Protection ('the Department') to submit further evidence of his relationship with the sponsor on 27 February 2013. He replied to this on 17 March 2013. Those documents included a letter from the applicant, copies of bank statements for an account in the name of both the applicant and the sponsor, and some shopping receipts.
9. On 15 July 2013, the visa application was refused by a delegate of the Department. The reason for the refusal was that the delegate was not satisfied that the applicant met the requirements of cl.820.211(2)(d)(ii) of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations').
10. The applicant successfully applied for a merits review before the Migration Review Tribunal (as it then was). The Tribunal found that on the basis of the sponsor's mental health problems that she would suffer significant psychological and mental hardship if the applicant was forced to leave Australia. For that reason, it found that there were compelling reasons waiving the Schedule 3 criteria. It remitted the application for the combined visa on 11 March 2014. As a result of this, the Department granted the applicant a Partner (Temporary) (Class UK) Subclass 820 visa on 16 April 2014.
11. The matter did not end there. The Department apparently received allegations that the applicant was involved in a contrived relationship with the sponsor.² In order to investigate these allegations, the Department sent an officer to conduct a site visit to the applicant's family in India. This occurred on 31 March 2015. It appears that the only person spoken to by the officer of the Department, was the applicant's brother. The brother indicated that he was in communication with the applicant and told the officer that the applicant was unmarried, not in a relationship, and that he had indicated his

¹ Court Book ('CB') pp 52-95.

² CB pp 163-173.

intention to obtain permanent residency in this country before being married.³

12. Having received this adverse information, the Department invited the applicant to comment on it, because clearly it did not support the application for the visa. A letter was sent to him for this purpose on 25 May 2015. The letter set out the adverse information and details of the visit to his family home. The letter pointed out to the applicant that cl.801.221(2) of the Regulations required that he continue to be sponsored by his partner, and that he was the spouse of the sponsor.⁴
13. The applicant took the opportunity to respond to the Department's invitation and did so on 15 June 2015. He provided a considerable amount of supporting documentation which was designed to demonstrate to the Department that he and the sponsor remained in a spousal relationship. It also asserted that the applicant's brother provided false information about the applicant's present circumstances.⁵
14. A delegate of the first respondent was not satisfied that the applicant and the sponsor were in a genuine spousal relationship. Accordingly, the application was refused on 29 July 2015.
15. A further application for review was made to the Tribunal by the applicant on 11 August 2015. On 21 December 2015, the Tribunal invited the applicant to attend before it to give evidence and present arguments relating to the issues arising in his case.
16. In his response to the hearing invitation, the applicant advised the Tribunal that he would attend with his mother and the sponsor. Prior to the hearing, the applicant provided the Tribunal with further documents, including a further statutory declaration from him, photographs, shopping receipt, a further interim statement of account from an ANZ Bank Account held jointly by the applicant and the sponsor, and the registration details for a motor vehicle registered in the applicant's name.⁶ The statutory declaration of the applicant provided on this occasion asserted that he had been happily married to

³ CB pp 174-175.

⁴ CB pp 176-179.

⁵ CB pp 184-250.

⁶ CB pp 294-314.

the sponsor until he received information from the Department after it had spoken with his brother in India. In effect, the applicant was asserting that the sponsor came to learn that the brother had claimed that the applicant's parents were looking for a bride for him in India, which the applicant says is wrong. This caused arguments between himself and the sponsor and it seems a break in their relationship, but he claimed that he was trying to reconcile with her.⁷

17. The Tribunal hearing took place on 3 February 2016. The applicant gave evidence as did his mother. The applicant's sponsor did not attend at the Tribunal hearing and despite several attempts made by the Tribunal member to contact her by telephone, she was not able to be contacted.⁸
18. The Tribunal published its Decision Record on 4 February 2016.
19. I will now summarise the Statement of Decision and Reasons given by the Tribunal.
20. The Tribunal summarised the basis of the application, identified the relevant subclass for the visa and noted the criteria for the visa set out in Part 801 of Schedule 2 to the Regulations. It also noted that one of the primary criteria was cl.801.221 which was a time of decision requirement.⁹
21. The Tribunal also identified the issue in dispute as being whether the applicant satisfied cl.801.221.¹⁰ More specifically, the Tribunal identified the issue as being whether the applicant was the spouse of the sponsor and partner, noted the requirements for a sponsoring partner, and the definition of 'spouse' in s.5F of the Act.¹¹ The Tribunal correctly noted that it was required to consider evidence of the financial and social aspects of the relationship and the nature of the household and their commitment to each other, as required by reg.1.15A(3). It attached a copy of that regulation to the decision. The Tribunal concluded that the parties were validly married. In my view,

⁷ CB pp 294-299.

⁸ CB pp 316-318.

⁹ CB p 323 at [2].

¹⁰ CB p 323 at [3].

¹¹ CB p 324 at [16]-[17].

there is nothing erroneous in the Tribunal's summary of the criteria, regulation, or legislation.

22. The Tribunal then went on to consider the matters set out in reg.1.15A to assist it in determining if the applicant could satisfy cl.801.221(2)(c). With respect to the financial aspects of the relationship, the Tribunal expressed concern to the applicant about the lack of probative value of some of the documents he had provided, and indicated that it gave them no weight.¹²
23. With respect to the joint bank account, the transaction history covered the period of October 2015 to January 2016, and the Tribunal found no evidence that the sponsor had used the account in the relevant period.¹³
24. The Tribunal noted the evidence of the applicant and his mother to the effect that he is supported financially in this country by family and friends. Having considered the evidence, the Tribunal was not satisfied that the applicant and the sponsor pooled resources at the time of the decision. It found that the joint account appeared to be inactive and that the only asset in joint names proven, was a motor vehicle.¹⁴
25. The Tribunal considered the circumstances of the household, but was not satisfied that the applicant and the sponsor conducted a household as spouses at the time of the decision.¹⁵
26. The social aspects of the relationship were given consideration, and it was in this context that the Tribunal considered the evidence of the applicant's brother in India. It also considered the evidence of the applicant's mother including that she had never met the sponsor in person, and that she was aware that her son and the sponsor had separated. The Tribunal noted the evidence of the applicant that he objected to the fact that the Department had spoken only to his brother in India and that it had not sought out other family members. The Tribunal was not satisfied that the relationship was recognised by family and friends as a "*genuine partner relationship*" at the time of the decision.¹⁶

¹² CB p 325 at [23].

¹³ CB p 325 at [24].

¹⁴ CB p 325 at [30].

¹⁵ CB p 325 at [37].

¹⁶ CB p 326 at [38]-[47].

27. When considering the nature of the commitment between the applicant and the sponsor, the Tribunal noted the evidence of the applicant that he was hopeful of reconciling with the sponsor, but that he could not force her to do so. He claimed that he and the sponsor were planning to resume co-habitation.¹⁷ It was significant to the Tribunal that when discussing his plans for the future, the applicant did not make any mention of the sponsor.
28. The Tribunal was not satisfied that there was any prospect that the marital relationship between the parties would resume. It drew a negative inference from the fact that the sponsor had failed to attend, or make herself available to give evidence before the Tribunal. It was satisfied that the applicant and the sponsor were not cohabiting and was not satisfied that the relationship with the sponsor was demonstrative of a long term commitment to each other.¹⁸
29. Having considered the evidence, the Tribunal was not satisfied that at the time of the decision the parties were in a committed spousal relationship; that they established a household commensurate with spouses and a genuine and continuing relationship; that others recognised their relationship as genuine and continuing; or that they had a mutual commitment to a shared life to the exclusion of others. It was satisfied that the applicant and the sponsor were living separately and apart on a permanent basis. For those reasons, it concluded that the applicant did not meet the requirement in cl.801.221(2)(c) and accordingly, affirmed the decision of the delegate.

Submissions

30. The applicant made oral submissions before me.
31. With respect to ground one, the applicant repeated his complaint that the Department had spoken only to his brother when its officer attended at his family home. He repeated the evidence that he gave before the Tribunal that his brother was not normal. As his submission developed, it became apparent that his real complaint was the fact that the Department had sent him the letter dated 25 May 2015 which summarised the adverse information received from the brother,

¹⁷ CB p 326 at [49].

¹⁸ CB p 327 at [55]-[60].

including that his family did not regard him as married, and that his parents had started looking for a suitable bride for him. He submitted that the sponsor had seen this letter and this caused great distress to her. It caused stress in the relationship and the sponsor broke up with him. He blamed this letter for a series of events which caused him to lose his wife, his job and resulted in him suffering a mental breakdown. I put it to him that he was reviewing the decision of the Tribunal and asked how he said that the conduct of the Department in sending that letter had somehow made the Tribunal's decision procedurally unfair. He repeated in effect that the letter from the Department was the cause of the breakdown of the relationship and that this led to him being refused his visa.

32. With respect to ground two, he submitted that it was unfair to him that the Tribunal did not make more of an effort that it did to contact the sponsor when she failed to appear before it. He accepted that the Tribunal did make a number of attempts to contact her. He submitted that he told the Tribunal that she had informed him she would attend but that she was Bipolar. He conceded that he did not request an adjournment. He told the Court that he spoke to the sponsor the day after the Tribunal hearing who advised him that she had experienced car problems, and for that reason was unable to attend.
33. Counsel for the first respondent submitted that with respect to ground one, the majority of the applicant's submissions simply addressed material that was before either the Delegate or the Tribunal and that the applicant was in reality inviting the Court to conduct an impermissible merits review. Mr Cunyngham submitted that having spoken to the applicant's brother and received this information, the Department was required to put him on notice of that fact and seek his response. There was nothing improper in the actions of the Department in that regard. Mr Cunyngham submitted that any action taken by the Department did not render the Tribunal's decision unfair. He submitted that the Tribunal did take into account the fact that the applicant objected to the actions of the Department in failing to speak to other members of his family. Ultimately, he submitted that it was for the Tribunal to identify the material that it found relevant to its reasoning and to determine the weight to be accorded to that evidence.

34. With respect to ground two, the first respondent noted that the Tribunal did make several attempts to contact the sponsor. It submitted that the Tribunal was under no obligation to call the sponsor itself. The Tribunal was, it submitted, well aware of the sponsor's mental health condition, which it noted at paragraph 54 of its reasons. The effect of the first respondent's submission was that ultimately it was for the applicant to make his case before the Tribunal and that the Tribunal had no duty to make enquiries on the part of the applicant. Mr Cunyngham submitted that the mechanism by which an applicant can call witnesses is set out in s.361(2) of the Act. He submitted that s.361(3) of the Act specifies that whilst the Tribunal must have regard to an applicant's notice given pursuant to s.361(2), it is not required to accede to any request to call witnesses. In any event, it was submitted that the applicant's notice was not made in accordance with s.361(2) of the Act as it was given to the Tribunal outside the statutory time frame. Notwithstanding this, the Tribunal had made a number of attempts to contact the sponsor and there was no requirement on the Tribunal to do anything more.
35. The applicant was invited to reply to the first respondent's submissions. He was also given an opportunity to speak with the person who had attended with him at Court for the purpose of deciding whether there were any further matters he wished to put to the Court in support of his application, or of which he required clarification. Having taken the opportunity to speak with his friend, the applicant then made submissions that were in effect a narrative of the misfortunes that had beset him as a result of the breakdown of his marriage. He submitted that since the visa had been refused it had affected his whole life and caused him to become very depressed. In reality, this part of the applicant's submission was an invitation to the Court to conduct an impermissible merits review.

Consideration

Ground one

36. Ground one of the application cannot succeed. The actions of the Department in conducting a site visit to the applicant's parent's home in India did not amount to an error that can be attributed to the Tribunal, let alone a jurisdictional error. The Tribunal was required to

consider relevant evidence. It regarded the information gathered by the Department as relevant to the merits review and there was nothing unreasonable or illogical in it doing so. Having said that, the Tribunal did give consideration to both the applicant's complaint about the procedure adopted by the Department and the evidence of his mother. There was nothing procedurally unfair to the applicant about the Tribunal raising with him the information given to the Department by the brother. To the contrary, it was required to do so and to seek his response out of fairness to him.¹⁹ Having obtained the adverse information from the applicant's brother, the Department was required to disclose it to him and invite him to respond. It sent a letter addressed to him, not to the sponsor. It is most unfortunate that the sponsor became aware by reading the letter of what the applicant asserts were false claims. However, this did not render the conduct of the Tribunal procedurally unfair. As for the submission that the Tribunal did not give any consideration to the failure of the Department to speak with other members of his family, it was open to the applicant to address this in the presentation of his case. He sought to do so by calling his mother as a witness. The Tribunal noted that the applicant called no other witnesses on this aspect.²⁰

37. The applicant could himself have addressed this aspect by calling other members of his family, or presenting written statements from them. He did not do so. The decision of the Tribunal on the social aspects of the relationship was not so much an acceptance of the brother's evidence as the applicant asserts in ground one, but rather a failure on the part of the Tribunal to be satisfied on all of the evidence that the relationship was recognised by family and friends as a genuine relationship at the time of the decision.

Ground two

38. The applicant bore the responsibility for presenting his case to the Tribunal. When the sponsor failed to attend, the Tribunal attempted unsuccessfully on a number of occasions to contact her. The applicant did not request an adjournment to enable him to make further arrangements for the attendance of the sponsor. The Tribunal had no general duty to make enquiries on behalf of the applicant. The

¹⁹ Section 359A.

²⁰ CB p 326 at [46].

procedural fairness obligations of the Tribunal in conducting the hearing are set out in s.361 of the Act. It complied with those obligations. The applicant was given a hearing that enabled him to attend, give evidence, and present arguments. The failure of the sponsor to appear at the hearing did not render the conduct of the hearing procedurally unfair and did not cause the Tribunal to fall into jurisdictional error. It was neither unreasonable in the legal sense, or irrational for the Tribunal to proceed to make its determination. I dismiss this ground.

39. I will deal briefly with the applicant's reply to the submissions of the first respondent. The applicant told the Court of the misfortunes and the unhappiness he has experienced since making his application for the visa. That is indeed unfortunate but it demonstrated that at least in part what the applicant seeks from these proceedings is an impermissible merits review.
40. I make the orders to be found at the beginning of these reasons.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Heffernan

Date: 7 September 2016